

ESTTA Tracking number: **ESTTA618141**

Filing date: **07/28/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91204296
Party	Defendant Sparkle Life LLC
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Date	07/28/2014
Attachments	SLK_TAM-#2228393-v1-Applicant_s_Brief_on_Merits_(Final).pdf(135066 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
THE TRADEMARK TRIAL AND APPEAL BOARD

JJI INTERNATIONAL, INC.	:	
Opposer,	:	Appl. Ser. No.: 85356064
v.	:	Opposition No.: 91204296
SPARKLE LIFE, LLC	:	
Applicant.	:	

APPLICANT SPARKLE LIFE, LLC'S MAIN TRIAL BRIEF

SPARKLE LIFE, LLC

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Dated: July 28, 2014

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7; 4 McCarthy on Trademarks and Unfair Competition § 23:59	25
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I. INTRODUCTION

Applicant Sparkle Life, LLC, filed its application for the trademark SPARKLE LIFE in connection with Bracelets; Charms; Costume jewelry; Necklaces; Precious and semi-precious crystal stones and beads for use in jewelry on June 24, 2011. The application was assigned Serial No. 85/356,064. Finding no registered marks barring registration, the Examining Attorney approved the application and it published for opposition on November 15, 2011. JJI International, Opposer, filed an Extension of Time to Oppose on December 12, 2011. On March 14, 2012, Opposer instituted this proceeding. In its Notice of Opposition, Opposer relies on U.S. Registration No. 3,005,830 for SPLASHES & SPARKLES used in connection with jewelry. The mark registered on October 11, 2005.

Sparkle Life jewelry is a unique interchangeable jewelry system and sold in specialty stores and boutiques across the country. Sparkle Life specializes in providing jewelry and elements in Team Colors, Birthstones and Tropical themes. Individual components have an average wholesale price of \$17.50 (MSRP of \$38.00). In contrast, jewelry sold under the Splashes & Sparkles mark sells premade jewelry with earring shaving a common wholesale cost of \$3.00 and rings having a common wholesale cost of \$6.50/8.50.

Opposer's theory, however inexplicable, is that its registration for SPLASHES & SPARKLES somehow entitles them to preclude others from use of the work SPARKLE in trademarks relating to jewelry. This theory is set forth in survey construction and opinion proffered by Opposer as well as their attempts to "Enforce Its Rights in the SPLASHES & SPARKLES Mark" against The Bazaar Group, Inc. In an attempt to undue well-settled principles of Trademark Law, Opposer filed a civil trademark infringement action against The Bazaar Group for their use of the single-term mark SPARKLE. The notion that a registration for

SPLASHES & SPARKLES can entitle a registrant to exclude others from the use of the term SPARKLE in regard to jewelry is, of course, preposterous.

II. DESCRIPTION OF THE RECORD

A. Opposer's Evidence

Opposer's has submitted the following evidence in support of its case:

1. Opposer's Notice of Reliance Re: Opposer's Trademark Registration and Use filed January 13, 2014 as Docket No. 271, consisting of:

- a. Opposer's trademark registration for its SPLASHES & SPARKLES trademark;
- b. the TSDR record for SPLASHES & SPARKLES; and
- c. the complete registration file history for SPLASHES & SPARKLES.

2. Opposer's Notice of Reliance Re: Official Records filed January 13, 2014 as Docket No. 28, consisting of:

- a. Office Action dated March 1, 2011, The Bazar Group, U.S. Trademark Application No. 85180816 – SPARKLE;
- b. Request for Express Abandonment dated April 6, 2011, The Bazar Group, U.S. Trademark Application No. 85180816 – SPARKLE; and
- c. Notice of Abandonment dated April 7, 2011, The Bazar Group, U.S. Trademark Application No. 85180816 – SPARKLE.

3. Opposer's Notice of Reliance Re: Produced Evidence filed January 13, 2014 as Docket No. 29, consisting of portions of Applicant's SPARKLE LIFE catalog and printout of a third-party website evidencing use of the SPARKLE LIFE mark on jewelry;

4. Opposer's Notice of Reliance Re: Written Discovery Responses and Produced Documents filed January 13, 2014 as Docket No. 30, consisting of:
 - a. Applicant's Responses to Opposer's First Set of Interrogatories; and
 - b. Applicant's Responses to Opposer's First Request for Production of Documents;
5. Testimony declaration of Dr. Geoffrey T. Fong, Ph.D. ("Fong Dec."), filed January 13, 2014 as Docket No. 31, along with the Expert Report of Dr. Geoffrey T. Fong, Ph.D. ("Fong Report") attached thereto as; and
6. Testimony declaration of Opposer's Chief Executive Officer, Dale Kincaid ("Kincaid Dec."), filed January 13, 2014 as Docket No. 33, along with:
 - a. portions of Opposer's catalogs and other promotional materials for Opposer's SPLASHES & SPARKLES® products for the years 2006 to 2013; and
 - b. photographs taken at the 2013 Atlanta International Gift Market of advertising for Applicant's products bearing the SPARKLE LIFE mark.

B. Applicant's Evidence

Applicant's record in this case consists of the following:

1. Applicant's First Notice of Reliance filed March 14, 2014 as Docket No. 34, consisting of "[p]rintouts of websites having descriptive and/or trademark use of the term SPARKLE in conjunction with jewelry"; and
2. Applicant's Second Notice of Reliance filed March 14, 2014 as Docket No. 35, consisting of "[p]rintouts of Third-Party Registrations containing the term SPARKLE or SPLASH in conjunction with jewelry."

III. STATEMENT OF THE ISSUE(S)

Whether Opposer is permitted to exclude junior users from using the term SPARKLE in relation to jewelry by claiming such marks create a likelihood of confusion with SPLASHES & SPARKLES under 15 U.S.C. § 1052(d).

IV. RECITATION OF FACTS

A. The Term SPARKLE is a Weak Formative in the Jewelry Industry

Applicant is not the only company in the jewelry industry using a mark comprising the term SPARKLE. In fact, the use of “SPARKLE” is fairly diluted in the field.

There are a number of third parties who are currently using marks comprising the term SPARKLE in connection with jewelry. In fact, Opposer’s own evidence highlights significant use of the term SPARKLE, used as a single-word mark, by the Bazaar Group. The webpages captured in Applicant’s Notice of Reliance were all active at the time the evidence was submitted and located using a simple Google® search for “Jewelry” and “Sparkle.” The results included uses from high-profile sources such as Swarovski and Richard Simmons. While not inclusive of all results, the following forty (40) contemporaneous third party uses were found (*See* Applicant’s Second Notice of Reliance):

- Swarovski Sparkle Pierced Earing -
http://www.swarovski.com/Web_US/en/1156227/product/Sparkle_Pierced_Earrings.html
- Polyvore Sparkle Jewelry -
http://www.polyvore.com/sparkle_jewelry/shop?query=sparkle+jewelry

- Sparkle by Richard Simmons
http://www.jtv.com/jewelry?prefn1=A_BRAND&prefv1=Sparkle%20By%20Richard%20Simmons
- Sparkle Mom – <http://www.sparklemom.com>
- A Lot of Sparkle - <http://alotofsparkle.ecrater.com/>
- BFF Sparkle Heart Necklace -
<http://www.clares.com/store/us/goods/non+navigable+root/cat310216/jewelry/p92216/bff+sparkle+heart+necklace+set/>
- Chains and Sparkle Necklace - <http://www.shopkaloo.com/necklaces/chains-sparkles-necklace>
- Eternal Sparkles – <http://www.eternalsparkles.com>
- Little Sparkles – <http://www.sparklesstore.com>
- Fancy Sparkle Jewelry - <http://www.modcloth.com/th/fancy-sparkle-jewelry>
- Got Sparkles – <http://www.gotsparkles.com>
- Sparkles Gems in Jewelry - <http://sparklesgemsinjewelry.com/hand-made-jewelry.html>
- I Love Sparkles - <http://ilovesparklesjewellery.com>
- Bling & Sparkles – <http://blingandsparkles.com>
- Sparkle – <http://www.uksparkle.com>
- Wedding Sparkles – <http://www.weddingsparkles.com>
- Roxx and Sparkles by DEE – <http://www.roxxandsparklesbydee.com>
- Rustic Sparkles Necklace - <http://www.coolwaterjewelry.net/shop/rustic-sparkles-necklace-nc-152-49/>

- Sarah Sparkles Handcrafted Stone Jewelry - <http://www.sarahsparkles.com/>
- See Jane Sparkle – <http://www.seejanesparkle.com>
- Sparkle Fine Jewelry – <http://www.sparklefinejewelry.com>
- Sparkle Girls Jewelry – <http://www.sparklegirlsjewelry.com>
- Sparkle Jewellery – <http://www.sparklejewellery.ie>
- Sparkle Jewelry – <http://www.sparklejewelry.net>
- Stella & Dot Sparkle Shop - http://www.stelladot.com/shop/en_us/gifts/holiday-sparkle-shop
- Sparkles Boutique – <http://www.sparklestl.com>
- Sparkle Jewelry Set from ASHRO - <http://www.ashro.com/Sparkle-Jewelry-Set.pro>
- Sparkle Sedona – [www. http://www.sparklesedona.com](http://www.sparklesedona.com)
- Sparkles! - http://www.ectownusa.net/livelocalrenosparks/mem_sparkles
- Sparkles and Spurs – <http://www.sparklesandspurs.com>
- Sparkles by Sarwat – <http://www.sparklesbysarwat.com>
- Sparkles Custom Jewelry by Viv Wong – <http://www.sparklescustomjewelrybyvivwong.com>
- Sparkles Jewelry Design – <http://www.sparklesjewelrydesign.com>
- Sparkles Inspired Artisan Jewelry – <http://www.sparkles.me>
- Sparkles Accessories – <http://www.sparklesaccessories.com>
- Sparklez Jewelry – <http://www.sparklez.com>
- Stella & Sparkle Jewelry – <http://www.stellaandsparklejewelry.com>
- Texas Sparkle Jewelry – <http://www.texassparklejewelry.com>
- The Ultimate Sparkle – <http://www.ultimatesparkl.com>

- Yaf Sparkle – <http://www.yafsparkle.com>

Applicant's N

Furthermore, there are at least nineteen (19) Registrations for marks comprising SPARKLE for use in association with jewelry are shown below. (Applicant's First Notice of Reliance).

- Serial No. 77122506 - MAKE LIFE SPARKLE
- Serial No. 77193163 – SPARKLE MOM
- Serial No. 77307089 – SPARKLES & SPURS
- Serial No. 77562296 – ITS ALL ABOUT THE SPARKLE
- Serial No. 77655878 – CAMLA DREAM INSPIRE SPARKLE
- Serial No. 78622463 – PRINCESS SPARKLE
- Serial No. 78886379 – SPIRITUAL SPARKLE
- Serial No. 85222935 – SPARKLES OF HOPE
- Serial No. 85295752 – SILVER SPARKLE SHINE
- Serial No. 85379547 – BRING THE SPARKLE HOME
- Serial No. 85403583 – THE ULTIMATE SPARKLE
- Serial No. 85460934 – DESIGN, STYLE, SPARKLE!
- Serial No. 85519616 – THE SPARKLE FACTORY
- Serial No. 85571884 – MORE SPARKLE. MORE STYLE. MORE COMPLIMENTS.
- Serial No. 85633610 – TO LOVE, HONOR AND SPARKLE
- Serial No. 85977416 – SHIMMER'N SPARKLE

B. There is no Actual Confusion of the Respective Marks Despite the Long Term Contemporaneous Uses and Similarity of Trade Channels

There is no actual confusion of SPARKLE LIFE with SPLASHES & SPARKLES, though there has been ample occasion for that to occur. Applicant has been selling its goods alongside Opposer for over four (4) years. Opposer's own evidence shows that Applicant has promoted and offered for sale its jewelry products under the SPARKLE LIFE mark in the same channels of trade, to the same class of customers and at the same trade shows where Opposer promoted and offered for sale its jewelry products under the SPLASHES & SPARKLES® mark. (Kincaid Dec., ¶ 25; see also Docket No 30, Exhibit 1 at No.14).

Despite this long-term contemporaneous use; Opposer has not alleged, nor is Applicant aware of, any actual confusion occurring.

C. Opposer's Survey Evidence is Fatally Flawed

To rebut the overwhelming evidence that no consumer would ever confuse the parties' products, Opposer engaged and proffered an alleged expert on consumer confusion, Geoffrey T. Fong, Ph.D. (Fong) —a Professor of Psychology at the University of Waterloo and a Senior Investigator at the Ontario Institute for Cancer Research. The Internet survey upon Fong based his opinions was implemented by Waltham, Massachusetts-based entity named Applied Marketing Science, Inc. ("AMS"). The survey, however, was fatally defective in design and implementation. In addition to violating well-established principles for conducting likelihood of confusion surveys, the AMS survey (designed by Fong) (1) failed to approximate real-world market conditions, (2) made unsupported assumptions that lead to an under-inclusive sample universe, (4) used calculated leading language to encourage the desired responses and (5) used confusing language that resulted in irrelevant results.

Moreover, Fong has a history of designing surveys with the intent of reaching the desired result. As Judge Gertner of the Federal District for the District of Massachusetts has previously found in Fong's previous work for Opposer, Fong has "stacked the deck" in JJI's favor through his survey. See I.P. Lund Trad. ApS v. Kohler Co., 118 F. Supp. 2d 92, 109 (D. Mass. 2000).

Because it is not based on a reliable methodology or valid reasoning, neither Fong's testimony nor the AMS survey should be admitted into evidence in this proceeding, as set forth in Section V(H), *infra*.

V. ARGUMENT

The issue before the Board is simple: is the mark SPARKLE LIFE confusingly similar with the mark SPLASHES & SPARKLES when used in association with jewelry? The clear answer is NO. The marks are simply distinctly different, both visually and aurally and have vastly different connotations. In addition, the term "SPARKLE" is a weak formative, if not descriptive, in the context of the jewelry industry, therefore affording a narrow scope of protection to existing registrations that incorporate the term "SPARKLE." *BAF Industries v. Pro-Specialties, Incorporated*, 206 USPQ 166, 175 (TTAB 1980). Moreover, Applicant's and Opposer's customers are discriminating purchasers that carefully select the services that are provided by Applicant and Opposer so as to prevent any likelihood of confusion between the respective marks. For these reasons, Applicant's mark is entitled to registration.

A. Likelihood of Confusion Standard

In *In re E.I. du Pont de Nemours & Co.*, 177 USPQ 563 (CCPA 1973), the Court of Customs and Patent Appeals enumerated several factors to be weighed in a Section 2(d) likelihood of confusion analysis. When conducting its likelihood of confusion analysis, the TTAB must consider all du Pont factors for which there is evidence in the record. *Han Beauty*

Inc. v. Alberto-Culver Co., 57 USPQ2d 1557 (Fed. Cir. 2001). As discussed in greater detail below, in this case, the duPont factors to be considered are: (1) the dissimilarity of the marks in their entireties; (2) the number and nature of similar marks in use with similar goods, i.e. the commercial "strength" of a mark; and (3) the length of time the marks have co-existed without any instances of actual confusion. *In re E.I. du Pont de Nemours & Co.*, 177 USPQ at 567; See also *In re Majestic Distilling Co., Inc.*, 65 USPQ2d 1201 (Fed. Cir. 2003). Each case must be decided on its own facts and any one duPont factor may be dispositive in a confusion inquiry. *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 47 USPQ2d 1459 (Fed. Cir. 1998).

Opposer bears the burden of proof and must produce sufficient evidence to support its claim of likelihood of confusion. *Bose Corp. v. QSC Audio Products*, 63 U.S.P.Q.2d 1303, 1305 (Fed Cir. 2002). *The Hoover Co. v. Royal Appliance Mfg. Co.*, 283 F.3d 1357, 57 U.S.P.Q.2d 1720, 1722 (Fed. Cir. 2001)("In opposition proceedings, the opposer bears the burden of establishing that the applicant does not have the right to register its mark"). Opposer has not done so here. SPARKLE LIFE looks and sounds different from SPLASHES & SPARKLES and the connotation is utterly different. In the absence of both actual confusion and a reliable survey, Opposer can point to no basis for denying registration of SPARKLE LIFE mark.

B. There is No Likelihood of Confusion between Applicant's SPARKLE LIFE Mark and Opposer's SPLASHES & SPARKLES Mark

It is well settled that marks should be viewed in their entireties and that it is improper to dissect a mark. *In re Shell Oil Co.*, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993). The marks at issue must be compared in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d 1689 (Fed. Cir. 2005).

Furthermore, it is the impression that the mark creates as a whole on an average buyer, and not the parts of the mark, which is important. *In re National Data Corp.*, 224 USPQ 749, 751 (Fed. Cir. 1985). “[T]he test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result.” *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1727 (TTAB 2008). In addition, the Board has noted that no element of a mark is ignored simply because it is less dominant or would not have trademark significance if used alone. *Hewlett-Packard Co. v. Human Performance Measurement, Inc.*, 23 USPQ2d 1390 (TT AB 1991).

In comparing the entire marks of both Applicant and Opposer, it becomes evident that the marks are not alike, let alone confusingly similar. Each is a compound mark that includes the term "SPARKLE." This commonly used term, however, is where the similarities end. Even if marks share an element, when viewed in their entireties, those marks are not necessarily confusingly similar. See *Sports Authority Michigan Inc. v. PC Authority Inc.*, 63 USPQ2d 1782, 1792 (TT AB 2002).

In the instant matter, Applicant's mark includes "LIFE" which gives this mark obvious visual differences from Opposer's mark and makes the marks sound different when spoken. Perhaps of greater importance, Applicants inclusion of a term lending itself to a scope outside the product itself (*i.e.* lifestyle in contrast to an article) gives its mark a completely different connotation and commercial impression than is conveyed by Opposer's mark. In summary, although the marks share an element, because Applicant's mark also includes wording that clearly distinguishes its mark from Opposer's mark, when the marks are viewed in their entireties, they are not likely to be confused with one another, especially considering the

descriptive nature of "SPARKLE" and the strength of "SPARKLE" marks, discussed in greater detail below.

It is also worth noting that the term "SPARKLE" is the first element in Applicant's mark and the last element in Opposer's mark. This difference adds to, if not compounds, the differences in commercial impression. As a result, the marks look different and are pronounced differently. This distinction is important since "it is often the first part of a mark which is likely to be impressed upon the mind of a purchaser and re-membered." *Presto Products Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). See also *Palm Bay*, 73 USPQ2d at 1692 ("Veuve" is the most prominent part of the mark VEUVE CLICQUOT because "veuve" is the first word in the mark). It therefore stands to reason that marks comprising the same element, but with inverted positions, will convey different commercial impressions.

Applicant notes that many of the third party registrations and common law uses of "SPARKLE" outlined above include additional elements and remain different in sound and connotation. Considering the widespread usage of "SPARKLE" in the jewelry industry, the inclusion of additional elements, either before or after "SPARKLE," is not surprising because these identifiers are needed for consumers to distinguish between the various jewelers using "SPARKLE." Applicant's use of the modifier "LIFE" in its mark allows consumers to distinguish that mark from Opposer's mark and others, just as the other "SPARKLE" marks are distinguishable from Opposer's mark. Accordingly, this factor, the difference between the marks, weighs heavily, if not determinatively, in favor of the registration of Applicant's mark.

C. Opposer's Mark is Weak and Entitled to a Narrow Scope of Protection

1. Conceptual Weakness of Opposer's Mark

The level of distinctiveness into which the marks fall is another factor in the likelihood of confusion analysis. The word "SPARKLE" when used in the jewelry industry is weak formative and has been frequently used by others in connection with services provided in this industry. In particular, "SPARKLE" is a word that is commonly used in the industry and is used to attract consumers and conjure images that a given article of jewelry is "striking in appearance" or "lavish" because these are considered to be desirable attributes. Clearly, "SPARKLE," as used as part of trademarks in the jewelry industry, is descriptive of the goods that are provided under those marks because the use of "SPARKLE" informs consumers that the jewelry possesses this favorable quality. Therefore, Opposer's mark should be considered descriptive and only entitled to a narrow scope of protection. *Knapp-Monarch Company v. Polaron Products, Inc.*, 134 USPQ 412 (TTAB 1962) ("THERM" highly suggestive of heat insulated products). In fact, "[i]t has frequently been held that trademarks, comprising two words or a compound word, are not confusingly similar even though they have in common one word or part which is descriptive or suggestive of the nature of the goods to which the marks are applied, or of the use to which such goods are to be put." *Smith v. Tobacco By-Products and Chemical Corporation*, 113 USPQ 339 (CCPA 1957). Because Opposer's mark merely comprises a weak formative, its mark is only entitled to a narrow scope of protection and, in light of the differences between Opposer's mark and Applicant's mark discussed above, there is no likelihood of confusion between those marks.

2. Commercial Impact of Opposer's Mark

As an initial matter, Opposer claims in its brief that its mark is "inherently strong as a matter of law" because the mark is incontestable. In support Opposer cites *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022 (TTAB 2011). This characterization is not supported. The case expressly states the contrary, stating "[i]n

determining the strength of a mark, we consider both its inherent strength based on the nature of the mark itself and its commercial strength, based on the marketplace recognition value of the mark.” *Id.* at 1028. Accordingly, incontestability speaks to presumed distinctiveness (not subject to challenge for descriptiveness or genericness) and not strength (scope of protection).

The commercial strength of the mark cited as a bar to registration is another factor to be taken into consideration in making a likelihood of confusion analysis. Numerous trademark owners have used the words "SPARKLE" to identify services they render in the jewelry industry. As a result, "SPARKLE," when used with services in the jewelry industry, has become commonplace. Marks that are commonly used are considered diluted and weak. As the Board stated in *BAF Industries v. Pro-Specialties, Incorporated*, third party registrations containing similar marks:

... are relevant to show that a particular mark has been adopted and registered by so many individuals in a particular field for different products embraced by said field that a registration of the mark in that trade is entitled to a narrow or restricted scope of protection.

BAF Industries v. Pro-Specialties, Incorporated, 206 USPQ 166, 175 (TTAB 1980).

The Board also stated that any “confusion” created merely by the concurrent use of a descriptive term is not legally recognizable where the marks as a whole are visually and aurally distinguishable. *Bass Pro Trademarks v. Sportsman’s Warehouse*, Cancellation No. 92045000 (TTAB 2008).

Furthermore, it has been held that registration of a descriptive or highly suggestive term cannot preclude the subsequent registration of a similar suggestive or descriptive, but otherwise distinguishable term or trademark for like or similar goods. *Penn Dairies, Inc. v. Pennsylvania Agricultural Cooperative*, 200 USPQ 462, 466 (TTAB 1978). This suggests that consumers are

not confused by the repeated use of a common term so long as additional elements exist which make the marks distinguishable.

The Board has also recognized that third party registrations may be used to indicate a commonly registered element has a meaning for particular goods or services such that differences in other portions of the marks are sufficient to render the marks as a whole distinguishable. *Spoons Restaurant, Inc. v. Morrison, Inc.*, 23 USPQ2d 1735, 1740 (TTAB 1992).

As stated by the Board:

third party registrations are, however ... "competent to establish that a portion common to the marks involved in a proceeding has a normally understood and well-known meaning; that this has been recognized by the Patent and Trademark Office by registering marks containing such a common feature for the same or closely related goods where the remaining portions of the marks are sufficient to distinguish the marks as whole; and that therefore the inclusion of [the common element] in each mark may be an insufficient basis upon which to predicate a holding of confusing similarity."

Red Carpet Corp. v. Johnstown American Enterprises Inc., 7 USPQ2d 1404, 1406 (TT AB 1988) (citing *American Hospital Supply Corporation v. Air Products and Chemicals, Inc.*, 194 USPQ 340, at 343 (TTA B 1977)).

The multiple registrations and common law references outlined above incorporating "SPARKLE" for services in the jewelry industry establish that this term has some meaning and has become diluted. See *In re Broadway Chicken Inc.*, 38 USPQ2d 1559 (TTAB 1996). Furthermore, "SPARKLE" is a descriptive term. Where a term is diluted, particularly when it is descriptive, consumers are not likely to be confused into believing that different goods using a similar term come from the same source of origin. This is confirmed by the fact that the Principal Register of the United States Patent and Trademark Office includes at least nineteen (19) registrations (owned by eight separate entities) and forty (40) common law uses (by sixteen

different entities) utilizing "SPARKLE" for jewelry. Accordingly, based on the evidence of widespread third-party use of "SPARKLE" in the industry, a registration comprising "SPARKLE" for jewelry is entitled to only a narrow scope of protection, such that other descriptive, but otherwise distinguishable marks incorporating "SPARKLE" for jewelry can be registered because "purchasers have been conditioned to look to the other elements of the marks as a means of distinguishing the source of goods or services in the field." *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1566 (TT AB 1996) ("BROADWAY CHICKEN". not confusingly similar with "BROADWAY PIZZA" and "BROADWAY BAR & PIZZA" based on differences between the marks, geographic significance of "BROADWAY" and third-party use of "BROADWAY" in the relevant field). As discussed above, in this case, because of the differences in the respective marks, consumers are able to distinguish Applicant's mark from that of Opposer. Moreover, as discussed below, because the Applicant's and Opposer's consumers are discriminating purchasers, they would not be led to believe that Applicant's services are provided by the same source of origin as Opposer's services.

D. Lack of Actual Confusion

The best evidence of likelihood of confusion is actual confusion. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1317, 65 U.S.P.Q.2d 1201 (Fed Cir. 2003)("A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion."); *Molenaar v. Happy Toys*, 188 U.S.P.Q. 469 (TTAB 1975).

Applicant markets and/or promotes its jewelry products under the SPARKLE LIFE mark in the same or similar channels across the United States, i.e., trade shows, consumer catalogs, trade publications and company catalogs. (Kincaid Dec, ¶ 23; see also Docket No 30, Exhibit 1 at Nos. 10 and 11.) For example, Applicant attended at least the 2012 Atlanta International Gift

& Home Furnishing Market trade show, which Opposer also attended, marketed and offered for sale its SPLASHES & SPARKLES® products. (Kincaid Dec, ¶ 23; see also Docket No 30, Exhibit 2 at Exhibit 12.) Moreover, Applicant attended, promoted and offered for sale its jewelry products bearing the SPARKLE LIFE mark at the 2013 Atlanta International Gift & Home Furnishing

Market trade show, which Opposer also attended, promoted and offered for sale its SPLASHES & SPARKLES® jewelry products. (Kincaid Dec., ¶ 24.) In fact, Applicant's exhibitor space at the 2013 Atlanta Gift Market was on the same floor as Opposer's exhibitor space. (Id.) As a result, Applicant promoted and offered for sale its SPARKLE LIFE jewelry products to the same customers as Opposer promoted and offered for sale its SPLASHES & SPARKLES® jewelry products. (Id.) Additionally, Applicant's advertising from the 2013 Atlanta Gift Market states "As Featured in GIFTBEAT." (Id.) Many gift stores to which Opposer promotes and sells its SPLASHES & SPARKLES® jewelry products subscribe to this publication. (Id.)

Despite four (4) years of contemporaneous use and the commonality of trade channels alleged by Opposer, Opposer has not provided any evidence of any instances of actual confusion by consumers. Opposer's own evidence shows that its sales have been continuous and in similar trade channels as those of Applicant, to the extent that both parties attend the same trade shows. Thus, based on Opposer's own evidence, there has been a sufficient opportunity for confusion to have actually occurred. Under these particular circumstances, the absence of any actual confusion is entitled to probative weight. *Top Tobacco LP v. North Atlantic Operating Co.*, 101 USPQ2d 1163, 1174-5 (TTAB 2011). See also, *Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (the probative value of the absence of actual confusion

depends upon there being a significant opportunity for actual confusion to have occurred); *Central Soya Co., Inc. v. North American Plant Breeders*, 212 USPQ 37, 48 (TTAB 1981) (“the absence of actual confusion over a reasonable period of time might well suggest that the likelihood of confusion is only a remote possibility with little probability of occurring.”). Accordingly, the seventh and eighth du Pont factors of the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion weighs heavily in Applicant’s favor.

E. The Board Should Exclude All Evidence Concerning Opposer’s Survey

The experimental design used by Fong is a far cry from the Eveready format adopted by the Board. His opinions are the result of a grossly unreliable consumer survey and must be excluded under both Rule 403 and Rule 702. Despite, and perhaps because of, Fong's use of an incredibly simplistic approach, the flaws in his methodology and analysis are virtually innumerable, which cumulatively render his conclusions speculative and unreliable, and therefore irrelevant.

The survey is so flawed and unreliable as to invalidate its results and render it, and the related testimony of Geoffrey Fong, inadmissible under Fed. R. Evid. 702. See *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 594-95 (1993) (the court must ensure that expert testimony is not only relevant but reliable); see also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999)(holding that the Daubert standard applies to survey evidence).

Federal Rule of Evidence 702 provides three distinct substantive restrictions on the admission of expert testimony, such as that of Geoffrey Fong: the testimony must be based upon sufficient facts or data; the testimony must be the product of reliable principles and methods; and the witness must have applied the principles and methods reliably to the facts of the case. Fed. R.

Evid. 702. The party offering the expert testimony has the burden of establishing that the proffered testimony meets each of the three requirements by a preponderance of the evidence. *Padillas v. Stork-Gamco*, 186 F.3d 412, 418 (3d Cir. 1999). Survey evidence that is so flawed that it renders the results unreliable must be excluded. See *Spraying Sys. Co. v. Delavan, Inc.* 975 F.2d 387, 394 (7th Cir. 1992); *Universal Studios Inc. v. Nintendo Co.*, 746 F.2d 112, 118 (2d Cir. 1984)

Dr. Fong's report, testimony and the underlying survey are not based on sound methodology or valid reasoning, and consequently are unreliable. Accordingly, neither Geoffrey Fong's testimony nor the survey should be admitted into evidence in this proceeding.

1. The Design of Opposer's Survey is Fatally Flawed

According to his expert report Fong performed an internet-based consumer survey to examine likely consumer confusion deriving from the use of the SPLASHES & SPARKLES mark by JJI and the SPARKLE mark by Sparkle Life. Fong states that the results of the survey reveal that a likelihood of confusion. Fong Report at 4-5. Fong was assisted extensively in his survey work by a Waltham, Massachusetts-based entity named Applied Marketing Science, Inc. ("AMS"). *Id.* at 5.

With respect to the survey itself, once invited respondents entered the survey, they were presented with screening questions designed to eliminate respondents who were unlikely to be purchasers of Sparkle Life's goods. Fong Report at 6. After the respondents were screened, the Fong Report attempted to apply "a strict experimental design," in which "[t]he only difference between the two conditions of the survey was the jewelry brand name (SPARKLE LIFE vs. SHIMMER LIFE) compared with SPLASHES & SPARKLES." *Id.* (emphasis in original)

Respondents were first shown the JJI Splashes & Sparkles product and asked whether they had "ever seen **this** brand of jewelry before (in person or in an advertisement)." Fong Report at 10 (emphasis added). Respondents were then shown either the control or the Sparkle Life product image. *Id.* at 10. Respondents were asked: "Do you think that the jewelry in the image above is put out by the same company or by a different company that puts out the jewelry in the image you saw before, or are you unsure?" *Id.* (emphasis in original). Respondents who answered that the jewelry was "put out by the same company" were asked to explain their rationale. *Id.* Respondents who answered that the jewelry was put out by different companies, or were unsure were then asked a second question, whether "the jewelry in the image above is affiliated or connected with the company that puts out the jewelry in the image you saw before, it is NOT affiliated or connected, or are you unsure?" *Id.* at 11 (emphasis in original). Respondents who answered that the companies were affiliated or connected were asked their rationale. Respondents who did not express a belief that the products were from the same or affiliated/connected companies were not asked to explain their responses. *Id.*

Fong's "design" refers to a methodology in which respondents would be presented either with the "test" condition (using the actual SPARKLE logo) or a "control" condition (where the logo is reads SLEEK); he would then compare the results and, theoretically, any differences would be attributable to the logos alone.

Fong's report includes the AMS-generated tables and a chi-square analysis to demonstrate the statistical significance of AMS's findings. Fong Report at 12-18. The Fong Report then analyzes the respondents' explanations as to why they believed the products to be from the same company or affiliated/connected companies, classifying responses as either brand-related or "miscellaneous." *See id.* at 17-18, F-1 to F-9.

Fong does not provide any statistical analysis as to the significance of the relative numbers of respondents who provided "brand-related" or "miscellaneous" rationales, and does not analyze those results using his "experimental design" (*i.e.*, comparing the results of the test and control conditions) but asserts that the prevalence of brand-related reasons in the typed responses, as presented to him by AMS, "reinforce[s] the conclusion [...] that SPLASHES & SPARKLES and SPARKLE LIFE either come from the same source or are affiliated." He concludes the confusion arises from the "overlapping use of the word SPARKLE." Fong Report at 19.

Fong's opinions rest on a myriad of methodological deficiencies consistent with his basic lack of qualifications to testify as an expert in this case. The numerous and significant flaws, when viewed in their entirety, transcend issues of "weight" and render Fong's conclusions inadmissible.

Pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny, the trial court performs the gatekeeping role in determining the admissibility of expert testimony. *Thorpe v. Davol, Inc.*, C.A. No. 008-463ML, MDL No. 07-1842ML, 2011 WL 470613, at *12 (D.R.I. Feb. 4, 2011) (citing *United States v. Diaz*, 300 F.3d 66, 73 (1st Cir. 2002)). As a result of that gatekeeping role, the Court must examine the proffered expert testimony with respect to both reliability and relevance. *Id.* (citing *Diaz*, 300 F.3d at 73). To determine reliability under that standard, the assessment includes "a determination as to whether the reasoning or methodology underlying the testimony is scientifically valid . . . and whether that reasoning and methodology can be applied to the facts in issue." *Id.* (omission in original) (internal quotation marks omitted) (quoting *Diaz*, 300 F.3d at 73). In its performance of its relevancy determination, the Court must resolve whether the expert testimony, if admitted,

would likely assist the trier of fact to understand or determine a fact in issue. *Diaz*, 300 F.3d at 73 (quoting *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 81 (1st Cir. 1988)).

Thus, the Board's responsibility in such a determination is to ensure that an expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

The Fong survey employed a frequently criticized adaptation of the so-called *SquirtCo* survey methodology, itself recognized to be a highly suggestive methodology. In *SquirtCo v. Seven-Up Co.*, 628 F.2d 1086, 1087 (8th Cir. 1980), two soft drinks had the names "Squirt" and "Quirst." To determine a likelihood of confusion, the survey had asked respondents to listen either to just the two names or to radio advertisements. *Id.* at 1089 n.4. The respondents were then asked whether they thought the two products were put out by the same or different companies, and what made them think that. *Id.* As explained more fully *infra*, Fong's opinions are based on a consistently rejected adaptation of the already suggestive *SquirtCo* test.

2. Opposer's Survey Failed to Include a Representative Sample the Proper Target Universe

Data collection on the survey began on Thursday, December 27, 2012 and ended on Friday, December 28, 2012. A total of 15,500 people were invited to participate but only 1,100 respondents entered the survey, of which 412 (37%) were ultimately qualified for inclusion because they met all the screening criteria described below. Fong Report at 19. While the times that the survey began and ended are not provided in the report, it is clear that the survey was only open for twenty-four (24) hours at the most. Moreover, the survey was only open between Christmas and New Year's Eve. No explanation is provided as to why this time was chosen nor

was there discussion as to how the timing of the Holiday season would affect participation and/or responses.

Fong's report provides no explanation as to why only 7% of those invited to participate entered the survey. It is unclear if this is due to the timing of the Holiday season or for other reason. Non-responsiveness, however, is often not random, even when respondents are selected randomly from the entire target population. Methods to increase response rates include making several attempts to contact potential respondents and providing financial incentives for participating in the survey. Tolerable levels of nonresponse should be measured (e.g., using survey guidelines published by the former U.S. Office of Statistical Standards) and the survey expert should be prepared to provide evidence on the potential impact of nonresponse on the survey results. *See Shari Seidman Diamond, Reference Guide on Survey Research, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 229 (2d ed. Fed. Jud. Ctr. 2000), available at [www.fjc.gov/public/pdf.nsf/lookup/sciman04.pdf/\\$file/sciman04.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sciman04.pdf/$file/sciman04.pdf).*

Moreover, the Fong qualification methodology disqualified participants for reasons that do not affect the inclusion of the participant in the relevant universe. For example:

- There is no logical reason to equate one's electronic device to inclusion in the universe. The fact this disqualified participants is evidence that an Internet-based survey was an inappropriate methodology in this case.
- There is also no reason to exclude respondents under the age of eighteen (18) as there is no evidence of record to establish that minors are not potential consumers. Accordingly, the sample universe was under-inclusive.
- Rationale is also missing as to why anyone employed at a company that makes or sells computers, kitchen appliances, or home furnishings would be excluded.

- Fong states he selected the purchase qualification question based on a range of price points across Applicant's products, namely the \$25 to \$250 range. This design flaw fatally reduces the proper universe as it does not take the pricing of Opposer's products into account.

The purchase qualification question eliminated 537 participants, which exceeds the number of participants considered in reaching Fong's conclusions. There is no evidence of record which establishes that Opposer's goods are similarly priced. The only evidence of record goes to wholesale prices for Opposer's goods and not the retail prices. Moreover, Opposer's own evidence shows its goods are not sold as components but rather completed pieces that sell for significantly less than Applicant's combined pieces. For this reason alone, the survey universe was grossly under-inclusive and the survey results are irrelevant.

3. Opposer's Survey's Back-To-Back Presentation Failed to Approximate Marketplace Conditions.

Fong's opinions are inadmissible because the survey deliberately ignored marketplace conditions, which are essential to a trademark survey. It is accepted that "a survey to test likelihood of confusion must attempt to replicate the thought processes of consumers encountering the disputed mark or marks as they would in the marketplace." *Simon Prop. Grp.L.P.*, 104 F. Supp. 2d at 1038; *see also* 5 J. Thomas McCarthy, *McCarthy on Trademarks* § 32:163 (4th ed. 1999) (stating that "the closer the survey methods mirror the situation in which the ordinary person would encounter the trademark, the greater the evidentiary weight of the survey results"). Thus, a survey's failure to approximate marketplace conditions will provide grounds for the survey's exclusion. *Kargo Global, Inc.*, 2007 WL 2258688, at *7; *see also* Jerre B. Swann, "Survey Critiques," in *Trademark and Deceptive Advertising Surveys: Law, Science,*

and Design at 363, 374 (Shari Seidman Diamond & Jerre B. Swann eds., 2012) (identifying "a side-by-side or sequential presentation of stimuli where there is no such physical or temporal proximity in the marketplace" as a "fatal" marketplace distortion).

The Fong survey displayed the products back-to-back when such products would never appear in such a manner in the marketplace. The basic objective of any trademark likelihood-of-confusion survey is to perform an experiment that probes whether consumers in the actual marketplace are likely to be confused; *i.e.*, to conclude that the Sparkle Life products that they encounter are put out by Opposer. Under these circumstances, simply presenting images of the two products in sequence without any other context does not reflect the actual marketplace, and the results of a survey built on that counterfactual premise are irrelevant to real-world likelihood of confusion.

When a survey distorts the marketplace conditions by presenting two products seriatim or side-by-side, without any other products with which the consumer would be confronted in the actual marketplace, the obvious effect would be to exaggerate any confusion that might be detected and, thus, thoroughly undermine the reliability of the survey. *See Simon* 104 F. Supp. 2d at 1044; *see also Jordache Enters., Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1487-88 (10th Cir. 1987); *Kargo Global, Inc.*, 2007 WL 2258688, at *7; 4 *McCarthy on Trademarks and Unfair Competition* § 23:59. As has been stated with respect to seriatim presentations of marks, "[t]he proper test for likelihood of confusion is not whether consumers would be confused in a side-by-side comparison of the products, but whether confusion is likely when a consumer, familiar to some extent with the one party's mark, is presented with the other party's goods alone." *Kargo Global, Inc.*, 2007 WL 2258688, at *9 (quoting *Elizabeth Taylor Cosmetics Co. v. Annick Goutal, S.A.R.L.*, 673 F. Supp. 1238, 1248 (S.D.N.Y. 1987)).

4. The Fong Survey Was Impermissibly Leading.

Fong's use of the word "brand" in the initial question impermissibly focused respondents on the branding shown on the products. Surveys must not expose the respondent to a desired response before asking the critical question about a connection between the owners of the contesting marks. *See 5 McCarthy on Trademarks* § 32:172 ("Care must be exercised in framing questions designed to see if a respondent links two entities identified by similar marks. . . . It may be improperly leading to expose the surveyed person to a desired response before asking the critical question about a connection between the owners of the contesting marks."). Fong asked the respondents whether they had "ever seen [Opposer's] brand of jewelry before." Fong Report at 10.

Fong's deliberate suggestion that the survey was about brands was contrived to lead respondents into giving textual responses that were categorized as "brand-related." This methodology impermissibly led towards a likelihood of confusion based upon a brand-related reason and, therefore, must be rejected. Surveys under the Squirt format often suffer irreparably from "demand effects." *See, e.g., Simon Prop. Grp. L.P.*, 104 F. Supp. 2d at 1048. Individuals who had already stated either that they did not believe the products were put out by the same company were then asked whether the two companies were "affiliated or connected." This language was deliberately and impermissibly leading.

It is well established that questions asking whether the companies are "affiliated" or "related but different companies or organizations" result in serious demand effects that lead the respondent to the answer. *See, e.g. Universal City Studios, Inc. v. Nintendo Co.*, 746 F.2d 112, 118 (2d Cir. 1984); *Simon Prop. Grp. L.P.*, 104 F. Supp. 2d at 1048 (excluding an expert's survey due to demand effects stemming from the question asking whether the "the two web

pages are put out by 'related but different companies or organizations'"); *Kargo Global, Inc.*, 2007 WL 2258688, at *8; *Beneficial Corp. v. Beneficial Capital Corp.*, 529 F. Supp. 445, 450 (S.D.N.Y. 1982) (rejecting results of survey as demonstrating a likelihood of confusion when the survey asked "Do you think that there may or may not be a business connection between Beneficial Capital Corp. and the Beneficial Finance System Companies?" because, *inter alia*, "the question framed has a 'leading quality,' not well suited to eliciting an uninfluenced reaction from the persons questioned"). In other words, "the mere putting of a question creates the impression of a relationship." *Kargo Global, Inc.*, 2007 WL 2258688, at *8. Indeed, a "question that begs its answer by suggesting a link between plaintiff and defendant cannot be a true indicator of the likelihood of consumer confusion." *Scott Fetzer Co. v. House of Vacuums Inc.*, 381 F.3d 477, 488 (5th Cir. 2004) (citing *Universal City Studios, Inc.*, 746 F.2d at 118).

In *Kargo*, for example, "although the survey questions did not refer to the actual names 'cargo' and 'kargo', there exists a great likelihood that the back-to-back presentation of the parties' marks, followed by questions that asked respondents if they believed the marks were related, suggested to respondents that they *should* believe that a connection existed between the companies' marks." *Id.* (emphasis in original). Likewise, in *Simon Property Group L.P.*, the Federal District Court for the Southern District of Indiana was confronted with the same adaptation of the *Squirt* test as is present in this case. As was done in the Fong survey, the survey took the "*SquirtCo* format a step farther than any court has taken it by introducing an additional possible answer," that is—whether the companies were "related but different companies or organizations." *Id.* at 1048-49. There, the Court excluded the survey based on the likelihood that it would create a bias in favor of a finding of confusion. *Id.* at 1048.

As in *Kargo* and *MySimon*, Fong's second question, whether the two companies were affiliated or connected, was inherently leading. Once again, Fong has stacked the deck in his client's favor. See *I.P. Lund Trading ApS*, 118 F. Supp. 2d at 109. Essentially, Fong asks the respondents "do you think these products are put out by the same company?" and then, if the answer is anything but yes, he returns to the well to ask whether the companies are affiliated or connected, without providing respondents any understanding of what "affiliated" might mean or what the nature of the connection might be.

By disconnecting the issue of affiliation from the "same company" concept in order to ask respondents about a relationship twice, rather than once (*e.g.*, "Do you believe the products are put out either by the same company or by companies that are affiliated?"), Fong encouraged respondents to search for a connection between the two products.

5. The Survey's Language Led To Irrelevant Results.

Finally, the Fong survey used ambiguous and confusing questions that appear to have led to erroneous results. Where a respondent stated that he or she believed that the products were put out by different companies or was unsure of that question, the Fong survey then showed the non-Opposer product a second time and asked whether "the jewelry in the image above is affiliated or connected with the company that puts out the jewelry *in the image you saw before*, it is NOT affiliated or connected, or are you unsure?" *Id.* at 11 (second emphasis added). The image seen immediately "before" would have been the same image that the respondents were seeing. Respondents who thought the question referred to the image immediately before would reasonably have answered that the companies were affiliated or connected because the images were exactly the same.

A review of the actual responses strongly suggests that many respondents did, in fact, understand "the image you saw before" to refer to the first presentation of the non-Opposer product rather than the earlier display of the Opposer product. For example, respondents in the control group, who were presented with jewelry with a SPLASHES & SPARKLES logo and jewelry with a SHIMMER LIFE logo (*i.e.*, without any commonality in the names) stated the basis for their belief that the products were put out by an affiliated company as follows:

- Because they have similar names and the products seem like they would appeal to the same types of consumers.
- Same brand title and description on the tag, same presentation
- The names are very similar
- The title on the cards
- Because it has the same name
- Same company name
- Description at top was similar and both are of earrings
- They have the same name.
- Had the same name on the packaging

Fong Report at F-6. Although many of the responses in the test group (where SPARKLE LIFE was shown after Opposser's product) also identified some version of "same name" as a reason for finding affiliation, due to the nature of the questions and responses is unclear whether they might be referring to the earlier Sparkle Life image or the Splashes & Sparkles image. Fong's leading and ambiguous questions are incapable of producing reliable results, rendering the survey non-probative as to any questions in this case.

6. As The Fong Report Is Replete With Flaws, It Must Be Excluded.

Fong's mistakes and failures do not merely go to the weight of his testimony. Exclusion of survey evidence is justified "where a single error or the cumulative errors are so serious that the survey is unreliable or insufficiently probative." *THOIP v. Walt Disney Co.*, 690 F. Supp. 2d 218, 219 (S.D.N.Y. 2010); *see also Citizens Fin. Group, Inc. v. Citizens Nat'l Bank of Evans City*, 383 F.3d 110, 121 (3d Cir. 2004) (affirming the exclusion of a survey because the district court had determined that the "methodology was fundamentally flawed and because the danger of undue prejudice far outweighed the limited probative value of the survey, especially for a jury"); *Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 564-65 (S.D.N.Y. 2007); *Winning Ways, Inc. v. Holloway Sportswear, Inc.*, 913 F. Supp. 1454, 1465 (D. Kan. 1996). For example, in *Simon Property Grp. L.P.*, neither expert had offered any reason to believe that a leading survey would be acceptable for any purpose outside of litigation, and, therefore, the results of the surveys would have little or no probative value on the questions relevant to the case. *Simon Property Grp. L.P.* 104 F. Supp. 2d at 1052. As a result, the Court excluded the surveys under Rule 702 and *Daubert* and its progeny. *Id.* Further, the Court determined that the surveys must also be excluded pursuant to Rule 403 because the results were likely to create unfair prejudice, confuse the issues, waste time, and mislead the jury. *Id.*

Similarly, in this case, Fong's testimony must be excluded pursuant to Rule 702 and the principles of *Daubert*, as well as Rule 403. His survey suffered from innumerable flaws, all designed to stack the deck in JJI's favor. Fong's conclusions are unreliable because his survey failed to replicate the marketplace, failed to display the products as any consumer would view them, employed an improper universe, and employed leading and ambiguous questions that contributed directly to the results as to which he intends to testify.

For the foregoing reasons, the Court should preclude the trial testimony and expert report of Geoffrey T. Fong.

VI. CONCLUSION

In a particular case, any of the du Pont factors may play a dominant role. *In re E. I. du Pont de Nemours & Co*, 177 USPQ at 567. In fact, in some cases, a single factor may be dispositive. *Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991). In the present case, the record evidence shows that the dissimilarity of the marks and differences in commercial impression, coupled with the lack of any competent evidence, are so great as to outweigh the other du Pont factors, discussed above. Accordingly, opposer has failed to prove its case by a preponderance of the evidence.

Respectfully submitted,

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Dated: July 28, 2014

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing has been served on counsel to JJI International, Inc. by sending said copy on July 28, 2014 via electronic mail and First Class Mail, postage prepaid to:

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